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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VELOX EXPRESS, INC., Employer and JEANNIE EDGE, Charging Party	**Case Nos. 15-CA-184006**

CHARGING PARTY'S RESPONSIVE BRIEF TO AMICUS AND SUPPLEMENTAL BRIEFS REGARDING MISCLASSIFICATION AS A VIOLATION OF THE ACT

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I. Introduction

In its invitation for briefs, the Board requested briefs addressing the following question:

> Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?

Along with the supplemental brief filed by Respondent, six amici filed briefs arguing that the Board should not find misclassification to violate the Act. Rather than fully addressing the Board's question, however, these seven "Briefs in Opposition" focus only on arguing why misclassification should not be considered a violation of the Act *standing alone*. All of the Briefs in Opposition fail to address the alternative scenarios that have been presented for when misclassification should be considered a violation. Specifically, between the General Counsel's ("GC") supplemental brief, Charging Party's supplemental brief, and the seven amici briefs filed arguing in support of finding a violation, collectively "Briefs in Support," the Board has been presented with two alternative and doctrinally sound theories for when misclassification violates the Act, and one argument for why, even if misclassification were not a violation on its own, the Act requires that the Board order reclassification in order to fully remedy other violations.

The logical conclusion that must be drawn from the failure of the Briefs in Opposition to address these alternative theories is that they have no reasoned arguments against them—they focus on arguing that misclassification standing on its own is not a violation because that is the only way they have even remotely colorable arguments. Yet, even these tenuously colorable arguments against a per se violation fail when subject to any level of scrutiny. In fact, all of the arguments raised by the Briefs in Opposition have already been rebutted in Charging Party's Supplemental Brief filed on April 30, 2018 (and in the filed Briefs in Support).

Charging Party vigorously maintains that the text of the Act, existing caselaw, and congressional intent support a finding that misclassification *standing alone* violates the Act. As

stated by Ms. Edge in her attached direct response to the Board, misclassification by itself will mean that "[m]ost misclassified employees will not speak up due to independent contractors having no rights, and because of fear of losing their jobs." (Attachment A). Thus, the first portion of this brief will focus on rebutting the arguments made by the Briefs in Opposition against finding that misclassification standing alone violates the Act.

Even if the Board decides not to reach the question of a per se violation in this case, Charging Party and amici have presented alternative theories that would require the Board to find that misclassification violates the Act in the case at hand. The second portion of this brief will briefly describe these unchallenged alternative theories. Under any of these theories, it is clear that Velox's misclassification of its drivers as independent contractors violated the Act. Charging Party therefore requests that the Board uphold the ALJ's finding that misclassification violates the Act, either standing alone or in the context of the alternative theories that have been presented. Finally, this brief concludes by emphasizing that with or without a finding that misclassification violates the Act, the remedy for unfair labor practices occurring in the context of misclassification (i.e. where there is a finding that workers are employees who have been misclassified as independent contractors) must include reclassification.

II. The Board Should Find that Misclassification Standing Alone Violates the Act

In its Supplemental Brief, Charging Party addressed and rebutted a plethora of arguments against finding misclassification alone to be a violation of the Act. Charging Party demonstrated that there is abundant legal support for finding such a violation from the text of the Act to previous caselaw. Charging Party also demonstrated that finding such a violation would not require drastic changes to the Act or its allocation of the burden of proof, that finding such a violation would not go against congressional intent, that finding such a violation would not chill the use of bona fide independent contractors, and that finding such a violation would not

interfere with Section 8(c) of the Act or with free speech rights more generally. While they each emphasize different aspects of these arguments, the Briefs in Opposition do not raise any new arguments against finding misclassification to be a stand-alone violation. Thus, although Charging Party will not reiterate its entire argument from its Supplemental Brief, it will briefly contextualize the flawed arguments made by the Briefs in Opposition.

A. Finding a Per Se Violation Would Not Chill the Use of Bona Fide Independent Contractors and Would not Unfairly Punish "Good Faith" Misclassification

The most prevalent argument among the Briefs in Opposition is that finding a per se violation would destroy the industrial world by ending the use of independent contractors and stripping individuals of their ability to profit from running their own businesses. The American Trucking Association and the Customized Logistics and Delivery Association,[1] for example, spend the bulk of their briefs arguing that independent contractors are crucial to the trucking industry and that finding a violation would prevent those independent contractor relationships. The World Floor Covering Association spends the bulk of its brief arguing that finding a per se violation would inhibit the ability of individuals to develop and profit from their own business enterprises. The briefs from Respondent, the Coalition for a Democratic Workplace, and the HR Policy Association similarly devote sections to the argument that the Board should not find a per se violation because doing so would impermissibly chill the use of independent contractors in various industries. This argument also dovetails into a second prevalent argument among the Briefs in Opposition, that somehow the employee status test is so difficult to apply and so nebulous that finding a per se violation would unfairly prejudice employers who are guilty of a "good faith" misclassification or who "mistakenly" misclassify their workers.

[1] Some of the amicus briefs were filed jointly by various organizations. For ease of reference, this brief will refer to amicus briefs using the name of the first organization listed.

Ms. Edge aptly describes these arguments as nothing more than "smoke screen[s] that sounds good but [are] intended to take the attention off the actual question at hand with a lot of rhetoric but not a lot of foundation." (Attachment A). These arguments rely on fear tactics and unavailing threats of a slippery slope when, in actuality, they are based on fundamental misunderstandings regarding misclassification. These Briefs in Opposition also espouse mistaken beliefs regarding the use of independent contractors in various industries, and ignore the fact that no one has advocated against the use of true, bona fide independent contractors.

To begin, these arguments ignore one of the key facts emphasized in Charging Party's Supplemental Brief—that misclassification is not a phenomenon that just happens to employees or employers. Misclassification results directly from the actions taken by employers—namely, deciding to call their workers independent contractors and stripping them of all employee rights, while simultaneously taking steps to actually maintain an employee-employer relationship with those workers. Velox, for example, after labeling its drivers independent contractors and forcing them to sign agreements labeling them as such, "promulgated many rules specifying how the drivers/couriers were to perform their jobs," did not allow drivers to have "more than one route that operated at the same time" and did not allow drivers to choose their substitutes without approval. (*See* ALJD at 2-3). In other words, misclassification requires action by an employer and, as an employer profits from that misclassification whether or not it was intentional, an employer should not be given an out just by claiming that its misclassification was a "mistake."

Indeed, as stated in the briefs filed by the State Attorneys General (State AGs) and the National Employment Law Project (NELP), employers have strong economic incentives to misclassify, making it even less likely that any misclassification that does occur is mistaken. Ms. Edge, who has had experience working in the trucking industry, states that "it is very possible,

even in the trucking industry, to operate within the confines of the Law on this issue. And companies who do operate within the Law use independent contractors with no fear." (Attachment A)**.** Further, the briefs from the State AGs and the NELP challenge the overall picture painted by the Briefs in Opposition regarding the use of independent contractors.

The Briefs in Opposition describe a perfectly harmonious world where individuals voluntarily choose to be independent contractors, where this designation is never used by unscrupulous employers to deprive workers of their rights, and where these individuals truly run and develop their own businesses. Unfortunately, for the most part, this is nothing more than a fiction put forth by these industries to hide the true costs of misclassification. It is particularly interesting that industry groups for trucking and transportation are espousing the alleged benefits of the independent contractor model when these industries are some of the worst culprits of misclassifying employee drivers as alleged independent contractors. A 2014 study focusing on truck drivers operating out of the Nation's ports found that 49,000 of the approximately 75,000 port truckers were misclassified—this means that nearly 2 out of 3 port truck drivers were misclassified and thus stripped of their rights as employees.[2]

The briefs from the State AGs and NELP also directly challenge the framing by the Briefs in Opposition about the use of independent contractors across the country. The State AGs brief describes how "people rarely choose to work as 'independent contractors'" and instead have this classification thrust upon them when they apply for a job. (State AGs at 4). In fact, "it

[2] Smith et. al., *The Big Rig Overhaul*, National Employment Law Project (February 2014) *available at https://changetowinn.app.box.com/s/2kgbbx5e4f9wok50gl5z*. More recently, USA Today released a multi-part examination of the port trucking industry in Southern California and the sham leasing arrangements perpetrated by employers, describing the workers as "modern-day indentured servant[s]." Murphy, *Rigged*, USAToday (June 16, 2017) *available at* https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/

is not unusual to find 'independent contractors' working side-by-side with employees, doing the same work under the same supervisors, but without any employment protections." (*Id.* at 4-5). The State AGs brief then describes how a large percentage of so-called independent contractors across the country are actually misclassified, and it provides detailed information about how this misclassification harms the workers who are misclassified, harms employers who choose to follow the law and correctly classify their workers, and even hurts communities and governments who are forced to pick up the slack where employers have been able to abdicate their own responsibilities. Further, in direct contrast to claims about "mistaken" misclassification from the Briefs in Opposition, the experience of State AGs and studies conducted regarding misclassification demonstrate that "misclassification is rarely accidental. Rather, in most cases, the misclassification was 'done on purpose in order to gain a competitive advantage over employers that obey the law.'" (State AGs at 4).

The NELP brief similarly describes the incredibly detrimental effects of misclassification on all sectors of society, from the workers themselves to the public to law abiding employers. In addition, the NELP brief describes the multitude of financial incentives that employers across the country have to misclassify their workers, again challenging the claim that misclassification often happens "in good faith." Even high road industry groups—such as the Mechanical Contractors Association of America and the Signatory Wall and Ceiling Contractors Alliance—submitted briefs detailing how rampant misclassification hurts them when they try to compete against employers who are unlawfully benefiting from misclassifying their employees.

Thus, all of these Briefs in Support demonstrate the serious problems causes by unchecked misclassification, and provide a clear counterpoint to the perfect world of independent contractors envisioned by the Briefs in Opposition. Against this backdrop, it is a

stretch for the Briefs in Opposition to claim that misclassification is nothing more than a "valid economic business decision" or merely a mistaken legal opinion. It is clear that employers often have financial incentives to *misclassify* employees and, as the brief from the International Brotherhood of Teamsters points out, while "[b]reaking the law may, in fact, give an employer a competitive advantage, [the] governments role is to *correct and deter* such conduct, not promote it." (Teamsters at 7) (emphasis added). And, as more fully elaborated in Charging Party's supplemental brief, that is exactly what the main effect will be of the Board finding misclassification to be a violation on its own—it will dissuade the continued *misclassification* of employees as independent contractors. Considering the fact that the Board is tasked with protecting employee rights, dissuading this unlawful misclassification is the exact goal the Board should seek to attain. Any chilling effect that finding a per se violation would have on the use of bona fide independent contractors would be negligible and in line with the risk that businesses face from countless other decisions they make.

As stated in Charging Party's supplemental brief, "[t]he truth is that nearly every business decision an employer makes carries a concurrent risk of litigation: every time it turns down a job applicant, it risks liability; every time it decides whether a worker is exempt from wage and hour laws it risks liability; every time an employer fires a worker, it risks liability." (CP Supp. at 14). Yet, in these other contexts, we do not see employers escaping liability through unsubstantiated slippery slope arguments—employers cannot successfully argue non-discrimination laws should be eliminated because they interfere with legitimate business decisions about how to hire or fire or promote, and employers cannot defeat overtime laws by claiming that such laws chill their ability to make business decisions about which employees are exempt and which employees are not exempt. The fact is that these business decisions, like the decision of how to classify a

worker, have a drastic effect on the workers in question and any deprivation of their rights typically results in a windfall for the employer depriving them of those rights. Thus, as is the case in a multitude of other contexts, it is proper for an employer to be required to weigh and balance the pros and cons of making a determination about whether to classify a worker as an employee or as an independent contractor.

As stated by Ms. Edge, a contrary finding "would result in a loophole that allows employers to misclassify and to remove employees' rights." (Attachment A). A finding that misclassification does not violate the Act would buy into the argument that companies do not "have to be responsible in knowing and properly applying the Law." *Id.* This is nonsensical. Individuals must operate in compliance with dozens of laws every day, and they are not given the leeway to claim ignorance or to claim that they only violated the law as a mistake. As Ms. Edge states, "[r]egardless of the industry, if you are going to run a business, you have a responsibility and obligation to know the Law and apply it properly." *Id.* A Board finding that misclassification violates the Act would merely send the message that the same is true when it comes to misclassification, and would dissuade the continued *misclassification* of drivers while leaving the door wide open for companies to contract with bona fide independent contractors.

In fact, the fallacious nature of the argument that the Board would dissuade valid independent contractor relationships by finding misclassification to be a violation is demonstrated by Part III.B of NELP's brief. In that section, NELP describes how Velox and other companies have already been operating under statutes that take a much more narrow view of independent contractor exemptions than the NLRA—where it is more difficult for employers to have bona fide independent contractor relationships, such as in jurisdictions using the ABC test for employee status—and that these other formulations of the employee status test have not

dissuaded employers from continuing to both use bona fide independent contractors (or from misclassifying employees as independent contractors in order to gain competitive advantages). If Employers already operate under these other formulations of the employee status test, it is highly unlikely that the Board's application of the common law test will be the breaking point for these businesses using independent contractors.

Finally, it is worth re-emphasizing that finding misclassification to violate the Act would not require the Board to step into any of these other statutes. The Board's finding would be limited to the worker's status under the Act, and the Board's order to reclassify would also be limited to reclassifying as employees *under the Act*. For these reasons, it is clear that arguments about the Board dissuading businesses from making valid economic decisions are smokescreens.

B. A Per Se Violation Does Not Go Against Congressional Intent for the Act

Two other prevalent themes in the Briefs in Opposition is that a Board finding of a per se violation would be improper, because the Board has never addressed the issue before, and that finding a violation would interfere with congressional intent regarding independent contractors. In particular, the briefs from the Coalition for a Democratic Workplace, the HR Policy Association, and the Washington Legal Foundation make these arguments. Yet, as fully described in Charging Party's supplemental brief, these arguments fail.

To begin, it is because of the rise of misclassification in this country that this question now comes before the Board. The Board is often presented with scenarios in the modern workforce that it must analyze within the context of the Act in order to determine if those scenarios violate the Act. In those scenarios, the Board does not decline to find a violation merely because it has not yet addressed that specific question. Instead, the Board applies the text of the Act and analogous caselaw to make a determination regarding the scenario before it. That is exactly what the Board would be doing by finding misclassification violates the Act—it would

be examining the text of the Act and existing caselaw to determine whether misclassification standing alone violates *existing law*. There is nothing novel in that application. As described in Charging Party's supplemental brief and in the briefs filed by the International Brotherhood of Teamsters, the Signatory Wall and Ceiling Association, and the Mechanical Contractors Association of American, there is abundant support in the text of the Act and in case law for finding that the act of misclassification alone violates the Act. Indeed, it is difficult to imagine a clearer violation of Section 8(a)(1)—what interferes with, restrains and coerces employees in the exercise of Section 7 rights more than an assertion that those rights do not exist?

The second potion of this argument appears to rest on the claims that Congress intended to limit the Board's ability to determine who is an employee and who is an independent contractor, that congress intended "independent contractor" to be broadly defined, and that that the Board wanted businesses to use independent contractors even if it meant that there would be some collateral damage in the form of misclassified employees being denied their protections under the Act. These claims are completely unsupported and are just not true. All that the Briefs in Opposition cite to support their claim is the fact that Congress excluded independent contractors from the Act through the Taft Hartley amendment.

Charging Party acknowledges that Congress intended to remove bona fide independent contractors from the protections of the Act. This does not mean, however, that Congress intended to limit the Board's determination of who was an employee or that Congress intended to allow the independent contractor exemption to operate in a way that would remove employees who have been misclassified from the Act's protections. In fact, as described by the International Brotherhood of Teamsters, the congressional history supports an opposite finding. (Teamsters at 9). By recognizing that there is a "big difference" between employees and independent

contractors, and only excluding independent contractors, Congress made it clear that it *did not* want to exclude employees who could not be considered true "independent contractors." *Id.* Further, as later recognized by the Supreme court, the explicit purpose of the Taft Hartley amendment excluding independent contractors "was to have the Board and courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968). That is exactly what the Board has been doing for decades, and this in no way prevents the Board, once it has applied the common law to find misclassification, from further finding that that misclassification interferes with Section 7 rights. Such a finding would also have the concurrent benefit of dissuading *misclassification* while protecting the use of bona fide independent contractors.

Furthermore, the Supreme Court has specifically cautioned that "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996). The Board has also applied similar reasoning to the independent contractor exemption, cautioning that it is important "that employees not be denied the protection of the Act through an undue extension of independent contractor status." *Yellow Cab Co.*, 229 NLRB 1329, 1333 (1977). The Briefs in Opposition state, without support, that *Holly Farms* is inapplicable to the independent contractor exemption, citing only the exclusion of independent contractors. Again, this argument does not follow logically. Conceding that Taft Harley excluded independent contractors is not incompatible with properly interpreting that exception to ensure that only bona fide contractors are excluded from the Act.

Various Briefs in Opposition also place undue emphasis on the Supreme Court's recent decision in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018),[3] arguing that the Supreme Court's decision regarding the Fair Labor Standards Act ("FLSA") should result in a certain reading of the independent contractor exemption under the NLRA. This argument does not follow. To begin, *Encino Motorcars* was dealing with an entirely different statute, the FLSA, that has a different set of much broader exemptions than the NLRA. Further, the Court was not even examining an independent contractor exemption—it was only looking at the salesperson exemption from the FLSA. All of these facts make *Encino Motorcars* distinguishable and inapplicable to the independent contractor exemption under the NLRA. Further, even if *Encino Motorcars* was instructive in some minor sense, the Court makes clear that what is actually required when defining exemptions is "a fair (rather than a 'narrow') interpretation." *Id.* at 1142. And a "fair" interpretation of the independent contractor exemption is all that Charging Party is advocating for—the Board's common law test takes into account the totality of the circumstances, and it is "fair" for the Board to interpret this exemption in a way that ensures only bona fide independent contractors are excluded from the Act. In fact, it is actually the Briefs in opposition that go against this "fair" reading by advocating that "independent contractor" be treated as a "broad exception" that should be "broadly applied." *(See* HR Policy Assn. at 7-8).

[3] In fact, the brief from the HR Policy association actually miscites and misrepresents this case. They cite a comment from the *dissent* in a previous iteration of this case, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 195 L. Ed. 2d 382 (2016), and make the patently untrue claim that the Supreme Court has completely abandoned a specific tenet of statutory construction. This statement is outright incorrect, and the actual 2018 decision is much narrower than the 2016 dissent cited by the HR Policy Association.

For these reasons, the Act itself and its Congressional history support the Boards current interpretation of the independent contractor exemption, and support finding that misclassification of employees as independent contractors interferes with employees' Section 7 rights.

C. A Per Se Violation Would Not Impermissibly Shift the Burden of Proof

The next argument that appears in multiple Briefs in Opposition—including the brief by Respondent, the brief for the Chamber of Commerce, and the Brief for the Custom Logistics and Delivery Assn.—is the argument that finding a per se violation would impermissibly shift the burden of proof for a violation from the GC to the Employer. Once again, Charging Party's Supplemental Brief directly addresses and rebuts this argument. (CP Supp. at 11).

With support from the Supreme Court, the Board has long held that the burden of proving that an individual falls outside of the protections of the Act rests on the party seeking to exclude the individual. *see Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948) (citing *Javierre v. Cent. Altagracia*, 217 U.S. 502, 507-08 (1910).[4] With the independent contractor exception in particular, it makes sense to place the burden on the Employer because the employer is the party with the greatest access to evidence regarding how it structured its working relationship with its workers, and "thus, no unreasonable burden is imposed by placing the onus on them to affirmatively plead and substantiate such a defense on the basis of record proof." *Cent. Transp., Inc.*, 247 NLRB 1482, 1486 (1980) (quote from ALJD).

[4] *see also NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001) (upholding Board rule that party seeking to exclude persons as supervisors bears the burden of proof); *BKN, Inc.*, 333 NLRB 143, 144 (2001) (party asserting independent contractor status bears burden of proof); *Allstate Insurance Co.*, 332 NLRB 759 (2000) (party asserting supervisory or managerial status bears burden of proof); *AgriGeneral L.P.*, 325 NLRB 972 (1998) (party claiming exemption of agricultural employees bears burden of proof).

It is only logical to then take the next step of concluding that if an employer is unable to carry its burden of showing that its workers should be excluded from the Act, then the GC does not need to make a further showing for an 8(a)(1) violation because the misclassification itself interferes with, restrains, and coerces employees' exercise of their Section 7 rights. No further evidence is necessary to establish the 8(a)(1) violation because misclassified employees "will remain quiet because they need their jobs, allowing the companies to continue misclassifying . . . and profiting from that misclassification" unless the Board steps in. (Attachment A).

Furthermore, even if the Board were to find that the burden should have remained on the GC to prove a violation, the Board should nonetheless uphold the ALJ's finding of a violation because, as in the *Intermodal Bridge Transport* case also before the Board, there is no question that the GC has carried that burden. At hearing, in the instant case, the GC presented many more witnesses and documentary evidence than Respondent (even though Respondent is actually in a better position to have access to that evidence). This testimonial and documentary evidence presented by the GC carried the day even when weighed against the evidence that was presented by Respondent, and the Board should therefore find that the burden was met in this case even if the burden is on the GC to prove a violation.

D. Finding a Per Se Violation Does not Implicate Free Speech or Section 8(c)

The final argument that appears to permeate many of the Briefs in Opposition is the claim that finding misclassification to be a per se violation would interfere either with free speech rights or with Section 8(c). As described in Charging Party's supplemental brief, what this argument fails to grasp is that there is no free speech or 8(c) concern even if speech is implicated because the speech in question is inherently coercive and threatening. Further, this case should not even invoke free speech or 8(c) because it is not a case dealing with mere speech.

To begin, even if speech were somehow implicated in this case, Section 8(c) does not apply because the speech in question is inherently coercive and threatening. The very text of Section 8(c) recognizes that speech is not protected if it contains "threat of reprisal or force or promise of benefit." 29 USC § 158(c).[5] Here, the speech involved in misclassifying a driver contains an inherent threat because it communicates to employees that they will be unprotected, and thus subject to termination, if they engage in protected concerted activity. This implied threat is clearly sufficient to convert protected speech to unprotected speech under 8(c).[6]

Further, this case should not even invoke Section 8(c) or free speech arguments because the violation in question is not based just on an employer's speech. As described above, the misclassification violation inherently involves various actions and actual conduct by an employer—from requiring that drivers sign agreements identifying them as independent contractors, to exercising control over those workers or otherwise limiting the entrepreneurial opportunities available to workers, for example. In other words, an employer applies a legally significant label to a group of workers, strips those workers of their rights under the Act, while simultaneously taking action to establish an employee-employer relationship and treat those workers as employees under the common law employee status test. It is these *actions* that manifests the violation, not mere speech. And an employer should not be allowed to escape liability merely by couching its actions with the veneer of speech. As pointed out by the AFL-

[5] *See Childrens Ctr. for Behavioral Dev.*, 347 NLRB 35 (2006) (emphasis added) ("An employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees.").

[6] *See Hertzka & Knowles*, 206 NLRB 191, 194 (1973) (Statement "was not privileged by Section 8(c), but constituted an implied threat of employment loss, in violation of Section 8(a)(1) of the Act."); *see also Dal-Tex Optical Co., Inc.*, 137 NLRB 1782, 1787 (1962) (Overruling certain decisions because "[t]o adhere to those decisions would be to sanction implied threats couched in the guise of statements of legal position.").

CIO in its brief—"just as Section 8(c) does not insulate a requirement that employees sign a yellow dog contract," Section 8(c) should not insulate the employers actions that lead to misclassification just because Respondent screams about free speech or Section 8(c). (AFL-CIO at 5). Thus, neither Section 8(c) nor general concerns about Free Speech prevent the Board from finding misclassification to be a violation of the Act.

III. Misclassification Violates the Act Under Any of the Alternative Theories Put Forth

As touched on above and extensively detailed in Charging Party's supplemental brief, the Board should find that there is abundant support that misclassification standing alone violates the Act and that none of the arguments from the Briefs in Opposition stand up to scrutiny. Even if, however, the Board does not find that misclassification itself violates 8(a)(1) or finds it unnecessary to reach that issue in the instant case, the Board should find that Velox violated the Act in one of the alternative ways presented in Charging Party's supplemental brief and in amicus briefs, as described below. Finally, regardless of whether the Board chooses to address the issue of misclassification as a violation, at absolute minimum, the Board should find that a remedy that includes reclassification and a cease and desist order is appropriate in the case at hand and in any case where the ALJ has properly found that the Employer engaged in unfair labor practices against drivers misclassified as independent contractors.

A. Employer's Misclassification Violates the Act In the Context of Other Unfair Labor Practices

The first of the doctrinally sound alternative theories for how Velox has violated the Act through its misclassification of its drivers, as more fully presented in Charging Party's supplemental brief, is that misclassification violates the Act when it exists in the context of other unfair labor practices by the Employer. Although not framed in exactly the same way, both the

briefs from the AFL-CIO and from the Mechanical Contractors Association of American provide support for this alternative theory of a violation.

Existing Board law provides ample support for the finding that the chilling effect of certain actions by an employer are amplified by the existence of other violations of the Act. *see Forest Indus. Co.*, 164 NLRB 1092, 1094 (1967); *Bandag, Inc.*, 225 NLRB 72 (1976).[7] Such a finding, however, would not be based on inferring motive for the misclassification—instead, it would be based on the fact that the very existence of other violations contributes to how an employee perceives certain statements or actions. Thus, a statement can become more coercive once an employee becomes aware of an Employer's capacity to otherwise violate the Act. In this case, the Employer terminated Ms. Edge for speaking up after telling her to "drop the employee crap." (ALJD at 5-6). In the context of this egregious violation of the Act, there is no question that misclassified employees will be even more acutely aware that their classification strips them of their rights, and would thus be dissuaded from exercising those rights.

This theory of a violation is also supported by the Mechanical Contractors Association of American Brief. Although that brief primarily argues that misclassification is a per se violation under the Act, it also states that the "reality of this issue is that it will only come to light in Board proceedings when an employer improperly raises the 'independent contractor' defense in response to other unfair labor charges (ULPs)" and "[i]n cases where other ULPs are alleged and

[7] *See also Yellow Cab*, 229 NLRB at 643 fn. 1 (Member Murphy agreed with the rest of the Board members that the Employer violated Section 8(a)(1), but clarified in a footnote that she found it to be a violation "when considered in the context of other violations of the Act." Otherwise, the statement might have been nothing more than a factual prediction supported by financial records. *Id.); Arakelian Enterprises, Inc.,* 315 NLRB 47, 62 (1994) (Board's analysis of whether interrogation violates the Act examines all the surrounding circumstances as other violations of the Act make it more likely that the interrogation was unlawfully coercive).

misclassification is found, there are compelling reasons for finding an independent Section 8(a)(1) violation." (Mech. Cont. Assn. of Am. at 1-2).

Similarly, the AFL-CIO's brief also supports this theory of a violation. While the AFL-CIO does not opine on whether misclassification should be a per se violation, it does posit that against the background of Velox's termination of Ms. Edge for protesting her misclassification, and in light of Velox's comment to Ms. Edge to drop the employee issue, "the misclassification itself served as a threat to all of the misclassified drivers that they could not protest their treatment as employees without suffering retaliation." (ALF-CIO at 8). This framing is an implicit recognition that the ULPs committed by Velox in this case are sufficient to make the continued misclassification of all other drivers an independent violation, and this fact would also be true if the employer had engaged in other types of ULPs because employees would nonetheless have received the message that the employer is capable of violating the law if they—as alleged independent contractors with no rights—speak up about their working conditions.

Limiting the misclassification violation to contexts where the Employer has engaged in other violations of the Act would eliminate concerns about the lack of additional conduct by the employer, the burden of proof, and free speech because it would require that the GC affirmatively carry its burden of proving a separate violation of the Act before finding that misclassification is a violation. Accordingly, even if the Board chose not to address misclassification as a per se violation, misclassification most certainly violates the Act in the context of other violations by the employer who has misclassified its workers.

B. Misclassification Violates the Act When it is Actively Used to Interfere with Protected Activity

The Second alternative theory for how Velox's misclassification violates the Act was raised by the GC in its supplemental brief. In that brief, the GC argues that the Board should

uphold the ALJ's finding of a violation based on the fact that, in this case, the evidence demonstrates that the Employer has actively used misclassification to interfere with the Section 7 rights of its employees.

Once again, this theory of a violation does not require that any motive be established for the initial misclassification of these workers. Instead, it looks at subsequent actions taken by an employer—especially once an employer is put on notice of its possible misclassification—to determine whether an employer has used that misclassification to actively interfere with Section 7 rights. In the case at hand, Velox's active use of misclassification to chill Section 7 rights is unmistakable:

> there is no doubt that the Employer, through the protected concerted activity of spokesperson Edge, was on notice and keenly aware of the question of whether it had misclassified its drivers. Having determined to discharge Edge for her protected protests, it then took steps to maintain an arrangement infringing the section 7 rights of its remaining drivers.

(GC Supp. at 10). These steps include actions such as promulgating a new Route Driver Agreement "in an effort to support its pretextual reason for Edge's unlawful discharge and to inhibit complaints from Edge and the remaining drivers." *Id.* at 10. Further, as described by the GC, this more limited theory for finding a violation of the Act would "alleviate[] any concerns regarding burden of proof and free speech problems." *Id.* at 10-11.

Thus, even if the Board does not find, or chooses not to address, misclassification as a per se violation or a violation in the context of other unfair labor practices, the Board should find that misclassification violates the Act when it is actively used to chill Section 7 activity.

C. Any Remedy for Other Unfair Labor Practices Must Include Reclassification

Even if the Board does not find that misclassification is ever an actual violation of the Act, both Charging Party and the International Brotherhood of Teamsters have described in their briefs how the Act itself requires, in order to have effective remedies of other unfair labor

practices, that the Board issue an order to reclassify and to cease and desist from misclassifying workers in any case involving ULPs committed against misclassified workers.

In short, regardless of whether misclassification violates the Act, an acceptance of employee status is necessary to properly remedy any unfair labor practices that are found. Because Board remedies are typically only applicable to employees, it is thus necessary for an employer who has violated the Act to affirm that its workers are employees in order to give the Board's remedial order its intended scope and range. The perils of failing to do so can be seen from the actions taken by Pacific 9 Transportation after it first allegedly settled the charges against it—agreeing to post a notice to employees, and then telling its misclassified drivers that the notice does not apply to them because they are not employees. *see Pacific 9 Transportation*, Case 21-CA-150875, Advice Memorandum dated December 18, 2015. A failure by the Board to order reclassification in cases involving ULPs against misclassified employees will open the door to other employers similarly making a mockery of the Board process.

A Board order for reclassification in cases such as this one would fit squarely within the Board's broad authority to order such relief as is necessary to remedy a violation. *See United States Postal Serv.*, 211 NLRB 727, 730 (1974); *Peaker Run Coal*, 228 NLRB No. 16 (1977). Thus, in order to ensure the Act maintains its effectiveness, the Board must issue an order to reclassify and to cease and desist from misclassifying in any case where ULPs are committed against employees who the Board determines have been misclassified as independent contractors.

IV. Conclusion

For the reasons laid out above, Charging Party requests that the Board find that misclassification *standing alone* in a violation of Section 8(a)(1) of the Act. Barring that, if the Board chooses not to address that issue in this case, the Board should find that Velox has

violated the Act by misclassifying its drivers either under the theory that this misclassification violates the Act in the context of other violations by the Employer, or under the theory that Velox has used that misclassification to actively interfere with Section 7 rights. Finally, if the Board chooses not to address whether misclassification violates Section 8(a)(1) in this case, the Board must at minimum order that Velox reclassify its drivers in order to ensure that the other egregious violations found by the ALJ are properly remedied.

DATED: May 14, 2018

Respectfully submitted,

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By: _____
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By: _____
HECTOR DE HARO

My Response Brief to the NLRB Board:

I have read each brief that was submitted and I am beginning to think that it is to my advantage that I am not an attorney. From the Briefs I reviewed, it seems like attorneys, when the Law doesn't support their view, try to come up with arguments to skew the intention of the Law or to put up a smoke screen that sounds good but is intended to take the attention off the actual question at hand with a lot of rhetoric but not a lot of foundation. I speak from actuality of life experiences. I AM the misclassified worker who knows firsthand the damage done by the act of misclassifying standing alone. No other person who responded can say that they have been there and experienced it firsthand. That gives me a unique perspective that is beyond mere words on paper.

I find that in reading the briefs, those who agree it is a violation of the National Labor Relations Act to misclassify have legal basis' for their arguments. They are coming from fact rather than emotion. They are not just trying to create fear of what they say will result from following the Law. Law is not based on emotion or fear, and the law in this case makes it clear that misclassification violates the Act. Buying the argument that the National Labor Relations Act has no standing on the act of misclassifying alone would result in a loophole that allows employers to misclassify and to remove employees' rights by that misclassification alone. Most misclassified employees will not speak up due to independent contractors having no rights, and because of fear of losing their jobs. Thus, companies will be able to break the law by using this loophole that would be left open if the Board did not find that misclassification violates the Act.

The briefs presented that disagree with misclassifying as a violation of Section 8(a)(1) by itself, have a common thread. They do not believe the companies have to be responsible in knowing and properly applying the Law. By leaving this door open for companies to choose to

misclassify, they are putting the burden on the worker to determine if he is classified correctly. Most workers are not going to do anything about it when they realize they are misclassified because they know the classification carries no rights with it. They will remain quiet because they need their jobs, allowing the companies to continue misclassifying. Just as the current employees of Velox are being forced to stay quiet, so would other misclassified drivers. They remain quiet because they are classified as an IC with no rights – and they don't want to lose their jobs for speaking up about their misclassification, as I did. So Velox is free to continue misclassifying and profiting from that misclassification. No one has held them accountable.

Those briefs that state that it is not a violation to misclassify by itself, all speak of the risk that would evolve by hiring ICs if the Board found that misclassifying alone is a violation of the Act. I am very familiar with the ATA after working for 25 years in the trucking industry myself. I am also very familiar with true independent contractors and how they function. I know that it is very possible, even in the trucking industry, to operate within the confines of the Law on this issue. And companies who do operate within the Law use independent contractors with no fear, even in the trucking industry. This shows that independent contractors can be used with no risk to the companies operating within the Law that are using real independent contractors. Only those who operate outside the scope of the Law have reason to fear getting caught. Only employers who treat their workers as employees instead of independent contractors while labeling them independent contractors have reason to fear getting caught.

Regardless of the industry, if you are going to run a business, you have a responsibility and obligation to know the Law and apply it properly. No other area of Law, that I am aware of, gives you the right to break it and claim ignorance. There are laws to govern our driving, our roadways, many that govern our behavior in society, hiring processes for jobs, laws that govern

our overseas trade and so on. When those laws are broken, ignorance or good faith mistake are not reasons accepted to escape accountability. If you cause an accident, you are going to be held accountable whether you claim you knew the law or not, and whether or not the law is messy. It is our responsibility to know and apply the law if we are going to drive a car, and excuses will not allow you to escape responsibility.

It is the same with a business. They must know the laws that govern the operation of their business. The information is out there and easy to obtain. When we sit back and give loopholes for anyone to break the law and be able to rationalize it and get by with it, there are many that will take advantage and do just that. By saying it is NOT a violation to misclassify workers by that act alone, we are giving companies permission to skirt the law and to use ignorance and good faith mistake as valid arguments to escape responsibility for their actions. We are allowing companies to say it was an "accident" when they removed the rights of their workers, giving them our blessing to continue doing so and continue depriving workers of their rights. Loopholes do not provide protection to workers, whether employees or independent contractors – they only provide protection to the companies that are breaking the Law.

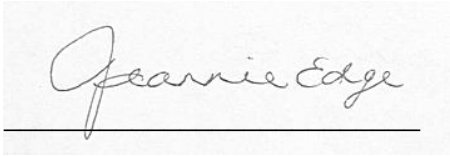
The argument of it interfering with free speech has no validity. Free speech is not to be used to violate and remove the rights of another. If that free speech tells workers, either verbally or in writing, that they are ICs and as such, have no rights, that free speech is not free. It has just cost a worker their rights under the Act. They have been robbed of their rights and dissuaded from exercising their rights under the cover of free speech.

Those who argue that misclassification is not a violation essentially want to approve and allow misclassification, and they seem to support this idea with a lot of rhetoric but no real substance. They do not want the companies to be responsible for their actions and they want to

give the companies an easy out. So if the companies do not have to be responsible for applying the Law correctly, who does? Who protects the worker from this injustice? Those of us who are "in the trenches" can see through the rhetoric and hyperbole. We recognize that most of their arguments are NOT to be taken seriously but are smoke screens to the actual facts.

It is true that independent contractors are important to businesses and they represent a large number of workers. But finding misclassification to violate the Act would not interfere with these true independent contractors. By deciding that misclassification alone is a violation of the Act, protection is given to the real IC so they can flourish in their own business, and protection is given to misclassified employees so they retain the rights that are theirs. I respectfully ask the Board to find in favor of the workers of this great nation by finding that misclassifying employees, in and of itself, is a violation of Section 8(a)(1) of the Act.

Thank you,



5/13/18

Jeannie Edge

CERTIFICATE OF SERVICE

I hereby certify that a copy of **CHARGING PARTY'S RESPONSIVE BRIEF TO AMICUS AND SUPPLEMENTAL BRIEFS REGARDING MISCLASSIFICATION AS A VIOLATION OF THE ACT** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on May 14, 2018.

A copy of the **CHARGING PARTY'S RESPONSIVE BRIEF TO AMICUS AND SUPPLEMENTAL BRIEFS REGARDING MISCLASSIFICATION AS A VIOLATION OF THE ACT** was also served upon the following by electronic mail on May 14, 2018.

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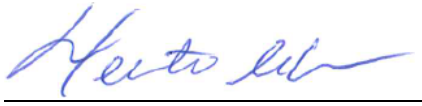

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